it seems illogical to add a tenancy in common for the period of coverture to an indefeasible right of survivorship and call the sum an estate by entireties. This cannot be the operation of the enabling acts upon an estate described as held *per tout,* with the negative re-iteration, *et non per my.* On the other hand, in the effort to save the logical integrity of the estate, it has been decided that the married women's acts had no effect at all,[15] and that after their enactment, as before, the husband had control of the entire *res* with power to convey it for the period of coverture.[16] This is supported by discovering a legislative intent to except this estate from that general effect of the enabling acts which has given married women effective control of the interests which they had at common law.[17] A third doctrine avoids the objections to both of the above views. It does not profess to find a tenancy in common where on principle one should not exist, nor does it fail to respond to the liberal spirit of the statutes of emancipation.[18] By this theory, no part of the estate can be conveyed for any period except by joint deed of husband and wife, nor is it subject to the debts of either one alone.[19] It is controlled by him and her in true joint unity, such a unity as, it is suggested above, may have been exhibited in very early times. This last solution seems consonant with sound reason and with that public policy which safeguards home property from the vagaries of either spouse.[20]

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IMPUTED NEGLIGENCE BETWEEN FELLOW SERVANTS.—It is a familiar principle that the concurrent negligence of one other than the defendant is no defense to an action against him by the injured party, if the latter was himself without fault.[1] Under the theory of imputed negligence, however, the principle admits of an exception, if the relation between the plaintiff and the negligent third person was such that the former must be deemed to have been guilty of contributory negligence. The harshness of such a doctrine whereby an innocent plaintiff is left without means of redress against an admitted tort feasor is apparent, and necessarily forbids its extension beyond the clearest cases.[2] Indeed, its invocation is justifiable only where some form of agency existed between the parties at the time of the injury complained of, to the extent that the plaintiff would have been responsible for the tortious acts of the third person.[3] The whole doctrine therefore, is but the converse of the time honored rule of *respondeat superior,* and can

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[15]Robinson *v.* Eagle (1874) 29 Ark. 202.

[16]Hall *v.* Stephens (1877) 65 Mo. 670; Bennett *v.* Child (1865) 19 Wis. 383.

[17]Pray *v.* Stebbins (1886) 141 Mass. 219.

[18]McCurdy *v.* Canning (1870) 64 Pa. 39; Naylor *v.* Minock (1893) 96 Mich. 182.

[19]Davis *v.* Clark (1866) 26 Ind. 424; Vinton *v.* Beamer (1885) 55 Mich. 559.

[20]Chandler *v.* Cheney *supra.*

[1]Beach, Contributory Negligence (3rd ed.) §§ 100, 101, 102.

[2]Robinson *v.* New York etc. R. R. (1896) 66 N. Y. 11.

[3]Shultz *v.* Old Colony R. R. (1907) 193 Mass. 309, 320; Buckler *v.* City of Newman (1904) 116 Ill. App. 546; Knightstown *v.* Musgrove (1888) 116 Ind. 121.

clearly have no application where the latter, in one of its various phases, would not govern.

A failure to adhere strictly to these elementary principles is in a large measure responsible for the great confusion which has occurred in dealing with the subject of imputed negligence. Thus, in the celebrated case of *Thorogood* v. *Bryan*,[4] it was held that the negligence of a carrier might be imputed to one of its passengers so as to prevent his recovering from another carrier who was likewise negligent. The decision was rested upon the ground that the plaintiff had in some manner become so identified with the carrier in whose care he had placed himself, that the latter's contributory negligence must be considered as his own. But it is obvious that any such reasoning is founded on a fiction. A passenger has no control over the servants of either a private or a public carrier; much less is it conceivable that he could ever be held liable for their tortious behavior towards third persons.[5] The essential features of an agency are thus entirely lacking, and the theory has accordingly been pronounced unsound even in the jurisdiction where it was first introduced.[6] So also the contributory negligence of a parent has been imputed to a child not *sui juris*, upon the ground that the former being intrusted with the infant's safe keeping impliedly becomes its agent.[7] Aside from being opposed to the dictates of natural justice, such a view is altogether unsupportable on principle. An infant cannot even appoint an agent;[8] nor has it ever been held that he is liable for the torts of his parents.[9] A similar position has been taken with regard to contributory negligence between husband and wife,[10] in cases where the latter has placed herself under the protection of the former. While a husband was liable at common law for the torts of his wife, it was not on account of any relationship of master and servant between them, but because he was the owner of her property, against which a judgment would have to be directed for satisfaction.[11] The marriage status in itself raises no presumption of agency,[12] and in the absence of any such relationship in fact, the better view is to the effect that the doctrine of imputed negligence is wholly inapplicable.[13] Thus the rationale of all these cases would seem to be that the fictitious agency arises from the fact that the

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[4](1849) 8 C. B. 115.

[5]Mills *v.* Armstrong (1838) L. R. 13 App. Cas. 1, 8, affirming The Bernina (1887) L. R. 12 Prob. Div. 58.

[6]The Bernina *supra*. It has been almost universally repudiated in the United States. See Shultz *v.* Old Colony R. R. *supra;* Little *v.* Hackett (1885) 116 U. S. 366; Duval *v.* Railroad Co. (1904) 134 N. C. 331.

[7]Hartfield *v.* Roper (N. Y. 1839) 21 Wend. 615; Wright *v.* Malden etc. R. R. (Mass. 1862) 4 Allen 283.

[8]Trueblood *v.* Trueblood (1856) 8 Ind. 195; Armitage *v.* Widoe (1877) 36 Mich. 124.

[9]See Newman *v.* Phillipsburg etc. Co. (1890) 52 N. J. L. 446, 449. This view is undoubtedly supported by the great weight of American authority. Burdick, Torts (2nd ed.) 444, 445.

[10]Carisle *v.* Sheldon (1866) 38 Vt. 440; Yahn *v.* Ottumwa (1883) 60 Ia. 429.

[11]Burdick, Torts (2nd ed.) 117, 132.

[12]Debenham *v.* Mellon (1880) L. R. 6 App. Cas. 24.

[13]Louisville etc. Ry. *v.* Creek (1891) 130 Ind. 139; Davis *v.* Guarnieri (1887) 45 Oh. St. 470, 487; Munger *v.* Sedalia (1896) 66 Mo. App. 629.

plaintiff has entrusted himself to the care and custody of the negligent third person, who is thereby placed in control. But the mere statement of such a proposition suffices to show its fallacy, since it is fundamental that an agent is always subject to the control of his principal.

The influence of this erroneous theory has lately been felt in cases calling for an application of the doctrine of imputed negligence between co-employees. Thus where several fellow servants were engaged in performing a common duty, and one had entrusted his safety to the care of his fellow, it has been held that the latter may be regarded as the agent of the former, and that therefore negligence was imputable *inter se*.[14] But here again the implication of an agency is equally unwarranted, as was pointed out in the recent case of *Rosenbaum Grain Co.* v. *Mitchell* (Tex. Civ. App. 1912) 142 S. W. 121,[15] where the plaintiff, while engaged in a car inspection, was injured through the concurrent negligence of the defendant and his own co-employee, whose duty was to warn him of approaching dangers. Between fellow servants although of unequal rank there exists no relation of master and servant,[16] unless the superior has some definite right of direction.[17] It has been urged, however, that the doctrine of imputed negligence may be invoked on the ground that they are engaged in a joint enterprise.[18] Such is undoubtedly the rule where this relation exists in fact,[19] since it is but a species of agency,[20] and there is a joint liability for torts.[21] But it is an essential feature of a joint enterprise that its members must be associated for the purpose of their mutual benefit; hence it should not be implied between co-employees who are associated primarily for the benefit of their employer.[22]

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THE INHERENT POWER OF CRIMINAL COURTS TO CONTROL THEIR SENTENCES.—In early times, when there were no writs of error or appeals in criminal cases, the courts found it necessary to exercise rather broad control over their sentences. Thus, they frequently postponed the rendering of sentence for a short and definite time, to enable the prisoner to apply to the executive for pardon.[1] They also

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[14]Abbitt *v.* Lake Erie etc. R. R. (1898) 150 Ind. 498.

[15]The opinion contains language to the effect that contributory negligence should not be imputed even between principal and agent. No case has been met with which sustains this extreme position.

[16]Chicago etc. Ry. *v.* Chambers (1895) 68 Fed. 148.

[17]Minster *v.* Citizens Ry. (1893) 53 Mo. App. 276.

[18]Abbitt *v.* Lake Erie etc. R. R. *supra;* Hodges J., dissenting in the principal case.

[19]Railroad Co. *v.* Kistler (1902) 66 Oh. St. 326, 343; Schron *v.* S. I. Elec. R. R. (N. Y. 1897) 16 App. Div. 111; Johnson *v.* Gulf etc. R. R. (1893) 2 Tex. Civ. App. 139.

[20]McCabe and Howard, JJ., dissenting in Abbitt *v.* Lake Erie etc. R. R. Co. *supra,* 526.

[21]Stroher *v.* Elting (1884) 97 N. Y. 102.

[22]Baxter *v.* St. Louis Transit Co. (1903) 103 Mo. App. 597; Bailey *v.* Jourdan (N. Y. 1897) 18 App. Div. 387; McKernan *v.* Detroit etc. Ry. (1904) 138 Mich. 519; 2 Labatt, Master and Servant § 482.

[1]Rex *v.* Rudd (1775) 1 Cowp. 331; State *v.* Graham (1879) 41 N. J. L. 15; see State *v.* Watson (1888) 95 Mo. 411.